Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ,

Petitioner

—v.—

ASTOL CALERO TOLEDO,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 5, 1979
CERTIORARI GRANTED JANUARY 14, 1980

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RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
1977		
July 14	1	Complaint, filed
Nov. 10	6	Answer to the complaint, filed
1978		
June 15	8	Plaintiff's interrogatories to defendants, filed
July 3	12	Co-defendants Astol Calero Toledo, etc., Motion to dismiss with memorandum of law in support of motion to dismiss, filed
July 3	13	Co-defendant Astol Calero Toledo's Motion to hold plaintiff's interrogatories in abeyance until a decision has been reached on defendants' motion to dismiss, filed. 7-14-78, Denied, (J. Torruella)
July 21	15	Defendants' answers to plaintiff's interrogatories, filed
Aug. 29	21	Plaintiff's motion in opposition to motion to dismiss, filed
Oct. 23	22	Decision and Order dismissing case. Judgment shall be entered accordingly, filed and entered (J. Torruella)
Oct. 24	23	Judgment dismissing complaint, filed and entered
Nov. 3	24	Plaintiff's motion requesting reconsideration of court's order dismissing case, etc., filed
Nov. 9	25	Defendants' motion in opposition to plaintiff's motion requesting reconsideration of order dismissing case, filed 11-3-78: 11-6-78 Denied (J. Torruella)
Nov. 24	26	Plaintiff's notice of appeal of judgment, filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No.: 77-1011

Plaintiff demands trial by jury

CARLOS RIVERA GOMEZ individually and on behalf of the Community Property Regime, PLAINTIFF

vs.

ASTOL CALERO TOLEDO, THE COMMONWEALTH OF PUERTO RICO, POLICE OF THE COMMONWEALTH OF PUERTO RICO, DEFENDANTS

COMPLAINT—Filed July 14, 1977

TO THE HONORABLE COURT:

COMES FORTH plaintiff represented by his undersigned attorney and respectfully states and prays:

1. Jurisdiction in the subject matter of this case is invoked pursuant to 42 USCA 1983 and 28 USCA 1343.

2. Plaintiff is a citizen of the United States and a resident of this judicial district.

3. Defendant Astol Calero Toledo at all material times herein was the Superintendent of the Police of the Commonwealth of Puerto Rico, hereinafter referred to as Police of Puerto Rico, and acted in said official capacity by virtue of authority vested under Law No. 77 of July 1, 1956, as amended, and regulations issued thereunder.

4. Plaintiff has been engaged in the public service with the Police of Puerto Rico since May 18, 1968, as agent, Bureau of Criminal Investigations, (Negociado de Investigación Criminal) formerly Criminal Investigation Corps. (Cuerpo de Investigación Criminal).

5. In or about the month of April, 1975, plaintiff, acting within his official duties, submitted to his Supervisor, Agent Luis Murphy Maldonado, sworn statement containing facts pertaining to false evidence obtained and

offered as admissible evidence in Law, by two other agents in a criminal case under their investigation.

6. Defendant Astol Calero Toledo ordered an official investigation pertaining to the facts and/or information given by plaintiff in the aforementioned sworn statement to his supervisor.

7. Subsequent to having the aforementioned sworn statement—plaintiff was summarily transferred from the Criminal Investigation Corps for the Southern Area to Police Headquarters in San Juan. A few weeks later plaintiff was again transferred to the Police Academy at Gurabo, Puerto Rico, as instructor, wherein plaintiff had no investigative authority.

8. As a result of the investigation ordered referred to in paragraph 6, the Legal Division of the Police of Puerto Rico, with date of June 20, 1975, rendered a written report to defendant Astol Calero Toledo, which report, totally exonerated plaintiff from the commission of any improper and/or illegal acts, found as true all facts given by plaintiff in the aforementioned sworn statement and recommended the discharge from the force of the two other agents.

9. In or about the month of April, 1976, during the term of plaintiff's duties at the Police Academy as instructor, plaintiff was subpoenaed by counsel for the defense to give testimony in the criminal case of the Commonwealth of Puerto Rico vs. William Gordon Pagán, Superior Court of Puerto Rico, Ponce Area, wherein plaintiff gave testimony as to his knowledge of said false evidence obtained and offered by two other agents in said criminal action.

10. As a result of plaintiff's Court appearance in the criminal case of the Commonwealth of Puerto Rico vs. William Gordon Pagán, referred to in paragraph 9, criminal charges were brought against plaintiff for the alleged act of wiretapping, in violation of Article 145 of the Puerto Rico Penal Code, which charges were filed upon information and/or evidence given by defendant Astol Calero Toledo.

11. Said criminal charges were filed against plaintiff at a time when it was defendant Astol Calero Toledo's knowledge that the Honorable Judge presiding said criminal proceeding against William Gordon Pagán and previously ruled, within said proceedings, that the acts upon which plaintiff might have been held to answer for a violation of said Article 145, if any, had occurred prior to the date said articles 145 and/or Penal Code had become effective.

12. By letter of May 26, 1976, defendant Astol Calero Toledo suspended plaintiff from employment for the reason given that plaintiff was being investigated.

13. By letter of July 14, 1976, plaintiff was discharged from employment without hearing for the alleged violation of Rules 3 and 26, Chapter 7, Sec. 1, Regulations, Police of Puerto Rico, which rules read as follows:

> *Rule 3*—To contest without any based motives he honesty, integrity and competence of any member of the force or civil officer, or make improper manifestations with the only purpose of denigrating his dignity.
>
> *Rules 26*—To observe an injurious, inmoral or disorderly conduct thus harming the Police Department.

14. That plaintiff's termination of employment is stated in paragraph 13, was based on the same facts upon which plaintiff had been totally exonerated by report rendered to defendant Astol Calero Toledo by the Legal Division of the Police of Puerto Rico at his request on June 20, 1975, attached hereto and made part hereof as Exhibit 1.

15. In or about the month of October 1976, within proceedings of preliminary hearing against plaintiff for the alleged commission of the act of wiretapping, in violation of Articles 145 of the Penal Code of Puerto Rico, the District Court of Puerto Rico and subsequently the Superior Court, upon appeal by the prosecuting attorney found no probable cause against plaintiff for the alleged violation of said article.

16. Plaintiff took and appeal from his discharge by defendant Astol Calero Toledo's letter of July 14, 1976, referred to in paragraph 13, before the Investigation,

Prosecution and Appeals Commission, hereinafter referred to as CIPA, which commission, after hearing, by ruling of December 1, 1976, revoked codefendant Astol Calero Toledo's administrative order discharging plaintiff from employment and ordering his reinstatement to his former position with salaries accrued.

17. That plaintiff's discharge without prior hearing was an act in violation of Law No. 26, of August 22, 1974, which Law which requires the celebration of administrative hearing prior to imposing disciplinary measures against members of the force and/or of his constitutional rights to a procedural due process of law and further violated plaintiff's rights not to be arbitrarily discharged from public employment.

18. That as a result of the acts of defendants herein above complained of plaintiff has suffered and continues to suffer stress, anxiety, embarassment and impairment to his reputation.

WHEREFORE, plaintiff respectfully requests from the Honorable Court that judgment be entered in his favor as follows:

1) Granting plaintiff judgment against defendants in the amount of FIFTY THOUSAND DOLLARS ($50,000.00).

2) Granting plaintiff in addition to compensatory damages, punitive or exemplary damages based upon the deliberate acts of defendants, in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000.00).

San Juan, Puerto Rico, July 14, 1977.

/s/ Jose Luis Rodriguez Mangual
JOSE LUIS RODRIGUEZ MANGUAL
Cond. Lemans Ofic. #306
Ave. Muñoz Rivera 602
Hato Rey, Puerto Rico 00918

VERIFICATION

I, CARLOS RIVERA GOMEZ, of legal age, married and resident of Ponce, Puerto Rico, after being duly sworn, depose and state:

That I have read the foregoing Complaint; and all of the allegations therein are true to the best of my knowledge and belief.

In San Juan, Puerto Rico, July 14, 1977.

/s/ Carlos Rivera Gomez
CARLOS RIVERA GOMEZ

Affidavit Number: ———

SWORN AND SUBSCRIBED TO before me by Carlos Rivera Gómez, of the personal circumstances above stated, personally known to me, this 14 day of July, 1977, in San Juan, Puerto Rico.

/s/ Ramón A. Alfaro
Clerk

By: /s/ [Illegible]
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

v.

ASTOL CALERO TOLEDO, *et al.*, DEFENDANTS

ANSWER TO THE COMPLAINT—
Filed November 10, 1977

TO THE HONORABLE COURT:

Appearing through their undersigned attorneys without submitting to the jurisdiction of the Court, the defendants hereby submit the following answer to the complaint:

GENERAL ALLEGATIONS

1. This Honorable Court lacks jurisdiction to entertain the action and grant the relief requested.
2. The complaint fails to state a claim against the appearing parties upon which any relief may be granted by the Court.
3. All conclusions of law alleged in the complaint are denied.
4. All factual allegations contained in the complaint, except those specifically admitted below and only as qualified therein, are denied.

SPECIFIC ALLEGATIONS

With respect to each numbered paragraph of the complaint, the defendants allege as follows:

1. The jurisdiction of the Court under the statutes involved is disputed.
2. Admitted.
3. Admitted.

4. Admitted. It is specifically averred, however, that he has not been performing investigative duties during all of this period of employment.

5. It is admitted only that on or about April, 1975 plaintiff made serious imputations regarding two other agents of the C.I.C. The rest of the paragraph is denied and it is specifically averred that plaintiff was not acting within his official duties in making the above imputations.

6. It is admitted only that an official investigation was conducted as a result of plaintiff's imputations. The rest of the paragraph is denied and it is specifically averred that said investigation failed to substantiate plaintiff's imputations and that therein it was recommended that plaintiff not be returned to duty in Ponce, that he be reprimanded in writing and that he be instructed to abstain from involving himself in investigations assigned to other agents.

7. It is admitted only that plaintiff was transferred from Ponce to Police Headquarters in San Juan and later to the Police Academy in Gurabo, as instructor, wherein he had no investigative duties. The rest of the paragraph is denied.

8. Denied.

9. It is admitted that in the criminal case against William Gordon Pagán conducted in March, 1976 plaintiff testified, on behalf of said defendant, that the case against him had been "fabricated" by two other agents and it is specifically averred that, notwithstanding plaintiff's testimony as to "fabrication" by the investigative agents, on March 27, 1976 the jury found the defendant guilty of first degree murder.

10. It is admitted only that as a result of plaintiff's testimony that he had taped telephone conversations he had conducted with one of the agents allegedly involved in the "fabrication", the judge presiding the criminal case ordered that the tapes be produced and subsequently criminal charges were brought against plaintiff for violation of article 145 of the Puerto Rico Penal Code. The rest of the paragraph is denied and it is specifically averred that the charges were filed pursuant to a report

& recommendation of Assistant Prosecuting Attorney Jorge Roberto Feliciano on May 20, 1976.

11. Denied. It is specifically averred that no such ruling was ever made by the Hon. Arturo Cintrón García within the criminal proceeding against William Gordon Pagán.

12. Admitted. It is specifically averred, however, that said action was in accordance with the applicable provisions of law.

13. Admitted. It is specifically averred, however, that said discharge was in accordance with the applicable provisions of Commonwealth law which provide for appeal before the Investigation, Prosecution and Appeals Commission (CIPA) rather than a pre termination hearing as alleged.

14. Denied.

15. Admitted. It is specifically averred, however, that said judicial determination in a criminal proceeding is totally irrelevant to the administrative disciplinary proceedings leading to plaintiff's dismissal three months earlier.

16. Admitted.

17. Denied.

18. Denied.

AFFIRMATIVE DEFENSES

1. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the subject matter of the complaint.

2. The complaint fails to state adequate statutory grounds to support the jurisdiction of the Court over the defendants.

3. The complaint fails to state adequate statutory grounds to support the jurisdictional grounds alleged therein.

4. The complaint fails to state an actual case or controversy cognizable in this Honorable Court.

5. Neither the Commonwealth of Puerto Rico nor the Police of the Commonwealth of Puerto Rico are "pre-

sons" amenable to suit under the provisions of 42 USC § 1983.

6. As Superintendent of Police of the Commonwealth of Puerto Rico, Astol Calero Toledo was merely an alter ego of the Commonwealth of Puerto Rico and thus not a "person" amenable to suit under 42 USC § 1983.

7. The complaint is barred by the provisions of the Eleventh Amendment to the United States' Constitution.

8. The complaint fails to state specific acts of the Superintendent of Police which amount to a deprivation of any of plaintiff's federally protected rights.

9. At all times pertinent to the complaint, defendant Superintendent of Police acted in compliance with the applicable provisions of law and in the good faith performance of his official duties as an executive officer of the Commonwealth of Puerto Rico.

10. Whether or not plaintiff had any property right subject to the due process protection of the federal constitution is a question dependent on the interpretation of Commonwealth law which presents no federal question.

11. The complaint fails to state a federal cause of action against the defendants upon which any relief may be granted by this Honorable Court.

12. Law No. 26 of August 22, 1974 did not require the celebration of an administrative hearing prior to the imposition of disciplinary measures upon members of the police force and thus the dismissal of plaintiff without a pre-termination hearing cannot be construed as violative of his rights to procedural due process.

13. Dismissal of plaintiff was effected after completion of an administrative investigation, in which plaintiff had the opportunity to be heard, and as a result of the recommendations made to the Superintendent of Police pursuant to said investigation.

14. The reinstatement of plaintiff to his position with back pay, effected by the C.I.P.A. upon his appeal in accordance with the applicable provisions of law, establishes beyond doubt that plaintiff was afforded due process of law and that his rights to "liberty" and "property" were adequately protected.

15. The fact that upon appeal the C.I.P.A. revoked the Superintendent of Police does not establish a violation of plaintiff's rights by the latter but, rather, only that the remedies afforded by Commonwealth law are entirely adequate to safeguard a person's property and liberty interests.

16. The Superintendent of Police having acted in strict compliance with the applicable provisions of law and within the bounds of his official authority, he is immune to a suit for damages under 42 USC § 1983.

17. Plaintiff having been reinstated with back pay, no injury to his property or liberty rights can be asserted herein and therefore no damages for their alleged deprivation without due process could possibly be established.

18. The persons conducting the administrative investigation and/or formulating the recommendations thereof are not parties to the present action although they are indispensable pursuant to the Federal Rules of Civil Procedure.

19. Absent the necessary factual allegations to support the equally absent allegations of bad faith and conspiracy, the allegations of the complaint are insufficient to assert a civil rights claim against the Superintendent of Police for, at best, all that could be established thereof is that the Superintendent incurred in administrative error in discharging plaintiff.

20. The actions of the Superintendent of Police herein involved constituted a valid and lawful discharge of his official duties which, particularly after a speedy and adequate administrative remedy rendered plaintiff whole, cannot be utilized as the basis for a civil rights claim in this Honorable Court.

PRAYER

Wherefore, the defendants hereby respectfully request that the complaint be dismissed, that costs and attorney's fees be taxed on plaintiff and that such further relief as the Court may deem just and proper be provided at the sound discretion of this Honorable Court.

In San Juan, Puerto Rico, this 10th day of November, 1977.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Assistant Secretary of Justice

/s/ Jose A. Gonzalez Gierbolini
JOSE A. GONZALEZ GIERBOLINI
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

vs.

ASTOL CALERO TOLEDO, ET AL., DEFENDANTS

MOTION TO DISMISS—Filed July 3, 1978

TO THE HONORABLE COURT:

Come now co-defendants Astol Calero Toledo, the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico through their undersigned attorneys and without submitting to the jurisdiction of this Honorable Court respectfully request the dismissal of the instant case on the grounds stated in the Memorandum of Law in support of this Motion to Dismiss which we are respectfully submitting attached herein.

Respectfully Submitted.

In San Juan, Puerto Rico, this 3rd day of July, 1978.

MIGUEL A. GIMENEZ MUNOZ
Secretary of Justice

CARLOS A. SHINE
Assistant Secretary of Justice

/s/ Francisco R. Agrait Llado
FRANCISCO R. AGRAIT LLADO
Attorney
Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

v.

ASTOL CALERO TOLEDO, ET AL., DEFENDANTS

DECISION AND ORDER—October 23, 1978

Plaintiff, an agent for the Bureau of Criminal Investigations of the Police Department of the Commonwealth of Puerto Rico, has brought this action against the former Superintendent of the Department.[1] Jurisdiction is invoked pursuant to the provisions of 42 U.S.C. 1983 and its jurisdictional counterpart, 28 U.S.C. 1343.

We shall address ourselves to Defendants' request for dismissal. At the outset, we reject as utterly frivolous Defendants' contention that the Eleventh Amendment bars suit against Defendant Calero. *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974). However, dismissal of the Complaint is required on a different ground.

As a general rule, public officers are liable in their personal capacity when, acting under color of law, they deprive others of their federal civil rights. *Screws* v. *United States*, 325 U.S. 91 (1945). However, a qualified immunity has been granted to executive and administrative officials for acts done by them in good faith within the scope of their official duties. *Pierson* v. *Ray*, 386 U.S. 547, 555-557 (1967); *Cobb* v. *City of Malden*, 202 F. 2d 701, 707 (C.A. 1, 1953) (Magruder, C.J., concurring); see also, *O'Connor* v. *Donaldson*, 422 U.S. 563

[1] Also named as Defendants were the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico. As a matter of law, these parties are not amenable to suit, and Plaintiff so concedes. *Kostka* v. *Hogg*, 560 F.2d 37, 43 (C.A. 1, 1977); *Ursulich* v. *Puerto Rico National Guard*, 384 F. Supp. 736 (D.C.P.R., 1974).

(1975); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, *supra*. In order to prevail in his monetary claims,[2] Plaintiff has the affirmative obligation to allege, and prove with particularity, that the defendants acted in bad faith, i.e., that their conduct was either purposefully discriminatory or reckless. *Gaffney* v. *Silk*, 488 F. 2d 1248, 1250-1251 (C.A. 1, 1973).

The Complaint filed in the instant case, even when read in the light most favorable to Plaintiff, completely fails to satisfy the requirement outlined above. From the Complaint's deficient allegations, no set of provable facts are apparent which would entitle Plaintiff to the relief claimed. *Scheuer* v. *Rhodes*, supra, at 236; see also *Stadium Films, Inc.* v. *Baillargeon*, 542 F. 2d 577 (C.A. 1, 1976); Alicea Rosado v. García Santiago, 562 F. 2d 114, 121 (C.A.1, 1977).

This case is hereby dismissed. Judgment shall be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 23rd day of October, 1978.

/s/ Juan R. Torruella
JUAN R. TORRUELLA
U.S. District Court Judge

[2] Plaintiff was reinstated to his former position, with back pay, by the Investigation, Prosecution and Appeals Commission of the Police Department, and his prayer is limited to monetary damages by reason of the "stress, anxiety, embarrassment and impairment to his reputation" allegedly occasioned by the acts of Defendants. An award of punitive damages is also prayed for in the *ad damnum* clause of the Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 77-1011

CARLOS RIVERA GOMEZ, PLAINTIFF

vs.

ASTOL CALERO TOLEDO ET AL., DEFENDANTS

JUDGMENT—October 24, 1978

The Court having entered a Decision and Order through Hon. Juan R. Torruella dismissing the complaint.

It is ORDERED AND ADJUDGED that the complaint be dismissed.

IT IS SO ORDERED.

San Juan, Puerto Rico, October 24, 1978.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 78-1546

CARLOS RIVERA GOMEZ, APPELLANT

v.

ASTOL CALERO TOLEDO, ET AL., APPELLEES

Submitted June 8, 1979

Decided Aug. 7, 1979

Agent for Bureau of Criminal Investigations of Police Department of the Commonwealth of Puerto Rico sued the police force superintendent, alleging that his suspension and discharge violated his civil rights. The United States District Court for the District of Puerto Rico, Juan R. Torruella, J., dismissed and agent appealed. The Court of Appeals, Bownes, Circuit Judge, held that, because of the superintendent's qualified immunity, the failure to allege that he acted in bad faith in suspending and discharging the agent required dismissal of the suit.

Affirmed.

James A. Toro and Jose Luis Rodriguez Mangual, San Juan, P. R., on brief, for appellant.

Hector A. Colon Cruz, Sol. Gen., and Federico A. Cedo Alzamora, Asst. Sol. Gen., Dept. of Justice, San Juan, P. R., on brief, for appellees.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

BOWNES, Circuit Judge.

The issue before us is whether the district court erred in dismissing this 42 U.S.C. § 1983 civil rights case for failure to state a cause of action.[1]

[1] Fed.R.Civ.P. 12(b)(6).

A brief statement of the facts leading up to the complaint is necessary. Plaintiff-appellant was, and is, an agent for the Bureau of Criminal Investigations of the Police Department of the Commonwealth of Puerto Rico. Because of accusations of improper conduct he made against two other agents of the Department, an investigation was ordered by defendant-appellee, Astol Calero Toledo, Superintendent of the Police Force of the Commonwealth. As a result of the investigation, plaintiff was transferred to the Police Academy at Gurabo, Puerto Rico, as an instructor with no investigative duties or authority.[2] Plaintiff subsequently testified in a criminal case on behalf of the defendant to the effect that false evidence was obtained and introduced by these two agents. His admission that he obtained this knowledge by tapping the telephone conversations of the agents resulted in criminal charges against him for violating the wiretapping statute of Puerto Rico. Plaintiff was first suspended and then discharged without a hearing by defendant. After an appeal to the Investigation, Prosecution and Appeals Commission, the discharge order was revoked and plaintiff was reinstated in his former position with full retroactive payment of salary.

The complaint originally named the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico as defendants in addition to Calero Toledo, but these defendants were dismissed with the consent of plaintiff. The complaint seeks damages because "plaintiff has suffered and continues to suffer stress, anxiety, embarrassment and impairment to his reputation." The district court held that because of defendant's qualified immunity as Chief of Police, plaintiff had to allege that he acted in bad faith in suspending and discharging plaintiff and that since the complaint failed to do so, even when read in the light most favorable to him, it was dismissed. No motion to amend the complaint was made.

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[2] Plaintiff alleges that as a result of the investigation, it was concluded that the charges were true, and it was recommended that the agents be discharged. Defendant claims that the inquiry found that the charges could not be substantiated.

Appellant raises three issues on appeal: that defendant was not, because of his position alone, automatically entitled to a qualified immunity; that the district court erred in finding that the complaint was deficient as a matter of law; and that the allegations in paragraph 18 of the complaint stating that the defendant failed to follow Police Department regulations as to disciplinary procedures amounted to an allegation of bad faith.

It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. Or to put it conversely, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed. 2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

Our cases reflect the accepted law that public officials enjoy a qualified immunity. *Maiorana* v. *MacDonald*, 596 F.2d 1072 (1st Cir. 1979); *Kostka* v. *Hogg*, 560 F.2d 37, 39 (1st Cir. 1977); *Gaffney* v. *Silk*, 488 F.2d 1248 (1st Cir. 1973). With the law now so clear on this point, it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action.

> Thus, while a § 1983 action for money damages may be maintained against such officials, plaintiffs have the obligation to sufficiently *allege* and prove that defendant's conduct was either "purposefully discriminatory," *Harrison* v. *Brooks*, *supra*, 446 F.2d [404] at 407 [1st Cir. 1971] "knowing or reckless," *id.* or "willful," *Ka-Haar, Inc.* v. *Huck*, 345 F.Supp. 54 (E.D. Wis. 1972) (emphasis added).

Id. at 1250-51.

This is not the ritualistic incantation of "catchwords," as appellant argues, but a basic pleading requirement. Fed.R.Civ.P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." We have made it abundantly clear that in 1983 actions the complaint must be specific and factual as to the claims made. *Hurney* v. *Carver*, 602 F.2d 993, at 995 (1st Cir. 1979); *Ludwin* v. *City of Cambridge*, 592 F.2d 606, 610 (1st Cir. 1979); *Slotnick* v. *Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977); *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977); *O'Brien* v. *DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed.

We, therefore, turn to an examination of the complaint bearing in mind that it must be read liberally and should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). We first note that paragraph 2 of the complaint alleges that the defendant acted in his official capacity as Chief of Police of the Commonwealth. This immediately invoked the doctrine of qualified immunity. Nowhere in the lengthy recitation of facts is there any reference to bad faith, malice or recklessness or facts on which such an inference could reasonably be based. While the complaint does allege that plaintiff was suspended and discharged prior to a hearing, it also states (paragraph 16) that plaintiff followed the Department appeal process and succeeded in being reinstated and awarded all back pay. This raises some doubt as to the allegations of paragraph 17 that his discharge, prior to a hearing, was in violation of the Police Department's own regulations and that his constitutional right to due process of law was violated. There is no rigid rule that requires

a pretermination hearing before discharge in all cases. In many instances, the requirements of swift and effective governmental action precludes a hearing until after the discharge. *See Rodriguez de Quinonez* v. *Perez*, 596 F.2d 486 (1st Cir. 1979), and *Levesque* v. *State of Maine*, 587 F.2d 78 (1st Cir. 1978). We point this out not to express an opinion on the merits, but to show that the complaint does not set forth facts alleging such wrongdoing by defendant as to raise an inference of bad faith. *Diez Gonzalez* v. *Colon Gonzalez*, 536 F.2d 453, 456 & n.12 (1st Cir. 1976). We think it also significant that plaintiff here did not move to amend the complaint after it was dismissed. In *Gaffney* v. *Silk*, *supra*, 488 F.2d at 1251, we held that an amended complaint should have been allowed, even though it was filed after the original complaint had been dismissed for failure to allege enough to overcome the qualified immunity of public officials. We do not take lightly the dismissal of a complaint for failure to state a cause of action in a 1983 case, but must assume that when the plaintiff is represented by counsel, the complaint is drawn in the light of the applicable law and contains the pertinent facts. The failure of plaintiff to allege bad faith, malice or recklessness in so many words plus the lack of any facts on which to make such an inference is fatal.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 79-5601

CARLOS RIVERA GOMEZ, PETITIONER

v.

ASTOL CALERO TOLEDO

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for a writ of certiorari be, and the same is hereby, granted.

January 14, 1980

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